90-1115

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CORREALE F. STEVENS, District Attorney of Luzerne County,
Petitioner

v.

M. RUSSELL BUCHANAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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January 8, 1991

QUESTION PRESENTED

Do the sixth and fourteenth amendments, through the confrontation and due process clauses, compel the total or partial exclusion of hearsay from state preliminary hearings?

LIST OF PARTIES

In the courts below, this case was captioned "Commonwealth of Pennsylvania ex rel. M. Russell Buchanan v. District Justice Edward Verbonitz and the District Attorney of Luzerne County." District Justice Edward Verbonitz, as a purely titular party, has no interest in the outcome of this petition and is thus not included in its caption.

TABLE OF CONTENTS

	PAGE
Question Presented	i
List of Parties	ii
Table of Authorities	v-x
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions Involved	2-3
Statement of the Case	3-13
Reasons for Granting the Writ	
The confrontation and due process clauses of the sixth and fourteenth amendments do not compel the total or partial exclusion of hearsay from state preliminary hearings.	14-35
Conclusion	36
Appendix A:	
Judgment and Opinion of the Supreme Court of Pennsylvania	1A-27A
Appendix B:	
Letter Order of the Superior Court of Pennsylvania	1B

PAGE

Appendix C:

Opinion and Orders of the Court of Common Pleas of Luzerne County, Pennsylvania 1C-8C

TABLE OF AUTHORITIES

	PAGE
Federal Cases	
Adams v. Illinois, 405 U.S. 278 (1972)	29
Barber v. Page, 390 U.S. 719 (1968)	15,32
California v. Green, 399 U.S. 149 (1970)	32
Coleman v. Alabama, 399 U.S. 1 (1970)	10-15, 26-28, 31-32, 35
Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973)	23,28
Costello v. United States, 350 U.S. 359 (1956)	30
Gerstein v. Pugh, 420 U.S. 103 (1975)	10-11, 13-15, 24-26, 29-32, 35
Goldsby v. United States, 160 U.S. 70 (1895)	25
Kentucky v. Stincer, 482 U.S. 730 (1987)	32
Mancusi v. Stubbs, 408 U.S. 204 (1972)	32
McCray v. Illinois, 386 U.S. 300 (1967)	32
Michigan v. Long, 463 U.S. 1032 (1983)	32

	PAGE
Pennsylvania v. Ritchie, 480 U.S. 39 (1987)	32
United States ex rel. Rutz v. Levy, 268 U.S. 390 (1925)	25
United States v. Andrus, 775 F.2d 825 (7th Cir. 1985)	33
United States v. Mitchell, 540 F.2d 1163 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977)	33
United States v. Wade, 388 U.S. 218 (1967)	27
United States v. Wilkins, 422 F. Supp. 1371 (E.D. Pa.), aff'd mem., 547 F.2d 1164, 1166 (3d Cir. 1976) and 559 F.2d 1210 (3d Cir. 1977), vacated, 441 U.S. 468 (1979), aff'd mem., 601 F.2d 577, 578 (3d Cir.), cert. denied, 444 U.S. 877 (1979)	33-34
State Cases	
Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990)	2
Commonwealth ex rel. Buchanan v. Verbonitz, 518 Pa. 469, 544 A.2d 447 (1988)	9

	PAGE
Commonwealth v. Bestwick, 489 Pa. 603, 414 A.2d 1373 (1980)	20
Commonwealth v. Branch, 292 Pa. Super. 425, 437 A.2d 748 (1981), appeal denied	20,26
Commonwealth v. Cartagena, 482 Pa. 6, 393 A.2d 350 (1978)	18
Commonwealth v. Carver, 292 Pa. Super. 177, 436 A.2d 1209 (1981)	31
Commonwealth v. Davis, 308 Pa. Super. 204, 454 A.2d 92 (1982), appeal denied	20
Commonwealth v. Genovese, 493 Pa. 65, 425 A.2d 367 (1981)	18
Commonwealth v. Mayberry, 459 Pa. 91, 327 A.2d 86 (1974)	16
Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 cert. denied, 404 U.S. 1000 (1971)	20,23
Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978)	17
Commonwealth v. Rashed, 496 Pa. 26, 436 A.2d 134 (1981)	15,25, 29
Commonwealth v. Rick, 244 Pa. Super. 33, 366 A.2d 302 (1976)	20,26

	PAGE
Commonwealth v. Ruza, 511 Pa. 59, 511 A.2d 808 (1986)	15,16
Commonwealth v. Scarborough, 491 Pa. 300, 421 A.2d 147 (1980)	23
Commonwealth v. Troop, 391 Pa. Super. 613, 571 A.2d 1084 (1990)	20,26
Commonwealth v. Wojdak, 502 Pa. 359, 466 A.2d 991 (1983)	17,18
Commonwealth, Unemployment Compensation Board of Review v. Ceja, 493 Pa. 588, 427 A.2d 631 (1981)	31
Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981)	35
Liciaga v. Court of Common Pleas, 523 Pa. 258, 566 A.2d 246 (1989)	17,18
Nollins v. Superior Court, 224 Cal. App. 3d 1171, 274 Cal. Rptr. 487, review granted, 1990 Cal. LEXIS 5550 (Cal. 1990)	21,34
People v. Campbell, 92 Misc. 2d 732, 401 N.Y.S.2d 152 (1978)	34
State v. Anderson, 612 P.2d 778 (Utah 1980)	35

	PAGE
State v. Massengill, 99 N.M. 283, 657 P.2d 139 (App. 1983)	35
United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982)	34
Wilson v. State, 655 P.2d 1246 (Wyo. 1982)	21,34

Federal Constitution, Statutes, and Rules

U.S. Const., Amend. VI	i,2-3, 7,8,12, 14
U.S. Const., Amend. XIV	i,3,8, 14
18 U.S.C. §3060	16
28 U.S.C. §1257	2
Fed. R. Crim. P. 5	16,19
Fed. R. Crim. P. 5.1	16-20
Fed. R. Evid. 1101	20

Pennsylvania Constitution, Statutes, and Rules

Pa. Const., Art. I, §9	11
42 Pa. Cons. Stat. Ann. §3112	23

	PAGE
Pa. R. Crim. P. 3	16,23
Pa. R. Crim. P. 122	16
Pa. R. Crim. P. 130	16
Pa. R. Crim. P. 140-49	16-19, 23,29

Other Authorities

Note, Confrontation Rights and Preliminary Hearings, 1986 Utah L. Rev. 75	21,34

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v.

M. RUSSELL BUCHANAN,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Correale F. Stevens, District Attorney of Luzerne County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, entered in this matter on October 10, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 581 A.2d 172, and reprinted in Appendix A at 2A-27A. The unpublished letter order of the Superior Court of Pennsylvania is reprinted in Appendix B at 1B. The unpublished opinion of the Court of Common Pleas of Luzerne County is reprinted in Appendix C at 2C-7C.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the Supreme Court of Pennsylvania on October 10, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

Subject to proof at trial, the facts of this case are as follows: On Saturday, April 26, 1986, Demita E., a seven-year-old girl, was alone with respondent in Demita's house in Wilkes-Barre Township, Luzerne County, Pennsylvania. Respondent, then the paramour of Demita's mother, was

responsible for babysitting Demita that weekend. Early on the morning of April 26th, Demita, who was still in her pajamas, went into respondent's bedroom and asked if he was going to take her to her swimming lessons. Respondent called her over to his bed. He then grabbed her and pulled her into the bed. Respondent held one hand over Demita's mouth, and used the other hand to remove her pajama shorts. Respondent, who was already naked, then turned the frightened child sideways and inserted his penis into her anus from the rear. He went in and out of Demita at least five times, causing her great pain. Following these acts, respondent sent Demita to her room for the remainder of the day. He also told the child that he would always be around, and that he would beat or whip her if she ever told anyone of the incident (N.T. 7/13/87, 7, 9-12).

Demita and her mother subsequently moved from Wilkes-Barre to Charleston, West Virginia. On January 30, 1987, they reported the attack to a West Virginia state agency, the Family Service Program of Kanawha Valley. Representatives of that agency interviewed Demita several times. The West Virginia agency contacted the Luzerne County District Attorney's Office, which assigned Detective Lieutenant Daniel Yursha to investigate. The detective twice interviewed respondent, who denied the incident. Detective Yursha also, on June 19, 1987, interviewed Demita. The detective subsequently swore out a complaint averring that respondent's actions constituted statutory rape and other crimes. On June 24, 1987, respondent was arrested. He was immediately released on bail, and has remained on bail throughout these proceedings (N.T. 7/13/87, 3, 5-7, 13-16, 20-23, 25, 27).

A preliminary hearing was held on July 13, 1987, before a magistrate, District Justice Edward Verbonitz. At that preliminary hearing, Detective Yursha testified as to the events leading up to his June 19, 1987 interview with Demita. Because Demita was then living in West Virginia and was not present to testify, the assistant district attorney requested the magistrate's permission for Detective Yursha to testify regarding the facts Demita had related to him. Upon receiving the on-record assurance of both the assistant district attorney and the detective that Demita would be present to testify at trial,[1] the hearing magistrate permitted Detective Yursha to testify to the facts as above stated (N.T. 7/13/87, 3-4, 15).

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[1]Detective Yursha testified that Demita's mother had agreed that the child would be present at trial (N.T. 7/13/87, 15).

Respondent's counsel objected to this testimony by Detective Yursha, stating that it was hearsay, and complaining that because Demita was not present he was unable to confront or cross-examine her as "guaranteed under the constitution" (N.T. 7/13/87, 30). The magistrate overruled the objection, relying on established Pennsylvania law permitting hearsay which would be inadmissible at trial to be used in preliminary hearings.[2] Respondent's counsel then cross-examined Detective Yursha. The magistrate held the case for court (N.T. 7/13/87, 3-4, 7-12, 18-20, 28, 30, 32-33).

On August 25, 1987, respondent filed in the Court of Common Pleas of Luzerne County a petition for writ of habeas corpus. In his petition, respondent claimed that Detective Yursha's testimony violated his federal constitutional rights under the sixth amendment to confrontation and to

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[2]See note 21, infra.

counsel, and demanded that the charges against him be dismissed. At a hearing before Judge Bernard C. Brominski of the Court of Common Pleas, the district attorney again confirmed that Demita's mother had agreed Demita would be present for trial (N.T. 9/9/87, 1, 8). On September 14, 1987, the Court of Common Pleas denied the petition for habeas corpus.[3]

After the Common Pleas Court rejected respondent's demand that it certify the question for appeal, respondent nonetheless obtained a stay of proceedings and filed a petition for review to the Supreme Court of Pennsylvania, the highest state court. In his petition for review, respondent renewed his claim that he had been denied his rights under the sixth and fourteenth amendments of the United States Constitution. The

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[3]In support of the September 14, 1987 order, the court on February 19, 1988, issued an opinion, accompanied by an order reaffirming the denial of respondent's petition for habeas corpus (App. 2C-8C).

Supreme Court of Pennsylvania received and considered briefs on the merits, and then, on jurisdictional grounds, transferred the petition for review to the intermediate appellate court, the Superior Court of Pennsylvania.[4] The Superior Court denied the petition for review on October 3, 1988.

Respondent sought discretionary review by the seven-member Pennsylvania Supreme Court. The Supreme Court granted discretionary review, received briefs and argument, and later ordered the case resubmitted to permit its consideration by a newly-seated justice. On October 10, 1990, the Pennsylvania Supreme Court over two dissents reversed the Superior Court, dismissed the charges and discharged the respondent.

Three justices, speaking through Justice Larsen, held that the use of

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[4]The Supreme Court's order transferring the petition is published at 518 Pa. 469, 544 A.2d 447 (1988).

hearsay at a preliminary hearing violated respondent's right to confrontation. In reaching that conclusion, the three justices emphasized that this Court in Coleman v. Alabama, 399 U.S. 1 (1970), had "held that a preliminary hearing is a 'critical stage' of the prosecution so as to constitutionally require representation by counsel," and had discussed the importance of counsel for cross-examination (App. at 7A-9A). The three justices also emphasized:

> While the United States Supreme Court has not specifically held that the full panoply of constitutional safeguards (ie. [sic], confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

(App. at 10A-11A). Based on the language of Pugh and Coleman, the three justices found that respondent "was denied the right

to confront and cross-examine the witnesses against him" (App. at 11A).[5]

Two other justices, speaking through Justice Flaherty, concurred in the result but based their analysis on the due process clause. The two justices stated that this Court's precedent provided the framework for their opinion, noting that this Court in Coleman had found a constitutional right to counsel at preliminary hearings, and that this Court had implied in Pugh that the rights to confrontation and cross-examination were constitutionally protected at a preliminary hearing. The two justices then went on to rule that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence" (App. at 16A). The two justices reasoned that this principle a fortiori applied to a

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[5]Justice Larsen, without citing any other authority, also found a correlative right under Art. I, §9, of the Pennsylvania Constitution.

preliminary hearing because under Coleman it was a critical stage of a criminal proceeding.[6]

Chief Justice Nix, joined by Justice McDermott, dissented, saying, "I am constrained to disagree with the holding that the Sixth Amendment of the United States Constitution which provides the accused with the right of confrontation in criminal proceedings was offended by the procedures followed in the instant matter" (App. at 19A-20A). The dissenting justices vigorously disagreed with the other justices' conclusion that the protection afforded defendants at this preliminary stage of the criminal prosecution encompassed the sixth amendment right to confront and

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[6]The three justices speaking through Justice Larsen agreed that this principle of due process must apply to preliminary hearings (App. at 5A-6A).

cross-examine potential Commonwealth witnesses.[7] Justice McDermott also filed a separate dissenting opinion to emphasize the limited function of a preliminary hearing.

Because the majority of the Supreme Court of Pennsylvania mistakenly determined, based on Coleman and Pugh, that the United States Constitution forecloses the instant use of hearsay testimony at preliminary hearings, petitioner, Correale F. Stevens, District Attorney of Luzerne County, files this petition for writ of certiorari.

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[7]The dissenting justices also noted that the other justices' conclusion conflicted with "the overriding interest this Commonwealth has shown in protecting child witnesses in abuse cases" (App. at 22A).

REASONS FOR GRANTING THE WRIT

THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE SIXTH AND FOURTEENTH AMENDMENTS DO NOT COMPEL THE TOTAL OR PARTIAL EXCLUSION OF HEARSAY FROM STATE PRELIMINARY HEARINGS.

This Court has never held that the right of confrontation which applies in criminal trials extends to preliminary hearings. Nor has this Court ever intimated that states were not free to allow hearsay in their preliminary hearings. Nonetheless, in this case the Pennsylvania Supreme Court, relying on language in this Court's opinions in Coleman v. Alabama, 399 U.S. 1 (1970), and Gerstein v. Pugh, 420 U.S. 103 (1975), ruled that the sixth and fourteenth amendments to the United States Constitution require the total or partial exclusion of hearsay evidence in preliminary hearings under the confrontation and due process clauses. This dramatic misinterpretation of the Constitution distorts

Coleman and Pugh, and is inconsistent with this Court's repeated pronouncement that confrontation is a trial right. Further, the decision is in conflict with numerous federal and state courts. Because this drastic extension of trial strictures to the preliminary hearing threatens its ability to serve the important function assigned to it under both state and federal procedure, this Court should grant review of this far-reaching constitutional issue.

In Pennsylvania, as elsewhere, the preliminary hearing performs a limited but vital function -- to protect against arrest and detention without cause by providing a prompt post-arrest assessment by a neutral magistrate.[8] Of necessity, the procedure is streamlined. The Pennsylvania Rules of

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[8] Commonwealth v. Ruza, 511 Pa. 59, 64, 511 A.2d 808 (1986); Commonwealth v. Rashed, 496 Pa. 26, 32, 436 A.2d 134 (1981); accord Barber v. Page, 390 U.S. 719, 725 (1968).

Criminal Procedure,[9] like the federal rules,[10] provide that the preliminary hearing must be held within ten days of the post-arrest preliminary arraignment.[11] It is held before a magistrate,[12] who determines only whether the accused should be held for trial.[13] The prosecution need not establish guilt beyond a reasonable

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[9]See Pa. R. Crim. P. 140-49. These rules establish and define the preliminary hearing in Pennsylvania. There is no state constitutional right to a preliminary hearing, Commonwealth v. Ruza, 511 Pa. at 64; Commonwealth v. Mayberry, 459 Pa. 91, 103, 327 A.2d 86 (1974), and the rules supersede the prior statutory provisions, Commonwealth v. Mayberry, 459 Pa. at 103.

[10]Fed. R. Crim. P. 5, 5.1.

[11]Pa. R. Crim. P. 140(d); see Fed. R. Crim. P. 5(d) (ten days in custody, twenty days if not in custody); 18 U.S.C. §3060. The preliminary arraignment, in turn, must be held "without unnecessary delay" (usually within hours) after the arrest. Pa. R. Crim. P. 122, 130; accord Fed. R. Crim. P. 5(a).

[12]See Pa. R. Crim. P. 141(d), 3(k); accord Fed. R. Crim. P. 5.1.

[13]Pa. R. Crim. P. 141(d), 143(a); accord Fed. R. Crim. P. 5.1(a), (b).

doubt, but must show only "a prima facie case of the defendant's guilt."[14] The actual guilt or innocence of the accused, the credibility of witnesses, and the weight of the evidence are not before the magistrate.[15] Rather, if the requisite

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[14]Pa. R. Crim. P. 143(a), 141(d). Federal Rule of Criminal Procedure 5.1 uses the phrase "probable cause to believe that an offense has been committed and that the defendant has committed it." Fed. R. Crim. P. 5.1(a), (b). Judicial interpretations of the Pennsylvania rules use the phrases "prima facie" and "probable cause" interchangeably. E.g., Commonwealth v. Wojdak, 502 Pa. 359, 367-68, 466 A.2d 991 (1983) (the Commonwealth must present "sufficient probable cause to believe that the person charged has committed the offense stated; in other words, it should make out a prima facie case of guilt" (plurality opinion; citations and quotation marks omitted)); Commonwealth v. Prado, 481 Pa. 485, 489, 393 A.2d 8 (1978) (the Commonwealth must show "at least prima facie that a crime has been committed and the accused is the one who committed it. This does not mean that the prosecution must prove the accused guilty beyond a reasonable doubt but rather, the prosecution must establish sufficient probable cause that the accused has committed the offense." (citations and quotation marks omitted)).

[15]Liciaga v. Court of Common Pleas, 523 Pa. 258, 263-64, 270, 566 A.2d 246

(continued...)

showing is made, the magistrate must bind the accused over for trial.[16] If the showing is not made, the defendant is not acquitted but merely discharged, subject to rearrest for the same or different charges, on the same or different evidence.[17]

Given the limited scope and lack of finality of the preliminary hearing, the lavish procedural protections afforded defendants at trial are not extended at a preliminary hearing. The Pennsylvania rules specify that the accused shall be present, and may, if he desires, be

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[15](...continued)
(1989); Commonwealth v. Wojdak, 502 Pa. at 369; Commonwealth v. Cartagena, 482 Pa. 6, 14, 393 A.2d 350 (1978).

[16]Pa. R. Crim. P. 143(a); accord Fed. R. Crim. P. 5.1(a).

[17]Pa. R. Crim. P. 141(d); Liciaga v. Court of Common Pleas, 523 Pa. at 266, 267; Commonwealth v. Genovese, 493 Pa. 65, 69 n.7, 425 A.2d 367 (1981); Commonwealth v. Cartagena, 482 Pa. at 14-15; accord Fed. R. Crim. P. 5.1(b) ("The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense").

represented by counsel[18] and call witnesses to a limited extent.[19] Like the federal rules, the Pennsylvania rules also permit the accused to "cross-examine witnesses ... offered against him."[20] Notably, the Pennsylvania rules, like the federal rules, do not require application of the rules of evidence governing trials; instead, until the decision below, the Pennsylvania Rules of Criminal Procedure were interpreted to allow hearsay evidence to be used in Pennsylvania preliminary

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[18]Pa. R. Crim. P. 141(c)(1); see Pa. R. Crim. P. 140 (providing for the appointment of counsel at the preliminary arraignment); accord Fed. R. Crim. P. 5.

[19]Pa. R. Crim. P. 141(c)(3) (the accused may "call witnesses on his own behalf other than witnesses to his good reputation only"); see Fed. R. Crim. P. 5.1 (the defendant "may introduce evidence").

[20]Pa. R. Crim. P. 141(c)(2); accord Fed. R. Crim. P. 5.1(a) ("The defendant may cross-examine adverse witnesses").

hearings,[21] just as hearsay can be used in federal preliminary hearings[22] and in

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[21]Commonwealth v. Troop, 391 Pa. Super. 613, 621-22, 571 A.2d 1084 (1990) (admitting hearsay testimony by officer that an accomplice had implicated the defendant in the crime); Commonwealth v. Davis, 308 Pa. Super. 204, 213-14, 454 A.2d 92 (1982), appeal denied (admitting hearsay autopsy report to establish death and cause of death); Commonwealth v. Branch, 292 Pa. Super. 425, 430, 437 A.2d 748 (1981) (en banc), appeal denied (admitting hearsay testimony by officer that a witness had seen the defendant shoot the victim); Commonwealth v. Rick, 244 Pa. Super. 33, 36-37, 366 A.2d 302 (1976) (en banc) (admitting hearsay blood test report to show that the defendant was intoxicated); see Commonwealth v. McCloskey, 443 Pa. 117, 137-39, 277 A.2d 764, cert. denied, 404 U.S. 1000 (1971) (arguing that a preliminary hearing provides only illusory benefit to the accused vis a vis a grand jury presentment, despite the right to cross-examine in the former, because both can be based solely on hearsay testimony); Commonwealth v. Bestwick, 489 Pa. 603, 614, 414 A.2d 1373 (1980) (same).

[22]Fed. R. Crim. P. 5.1 ("The finding of probable cause may be based upon hearsay evidence in whole or in part"); see Fed. R. Evid. 1101(d)(3) (federal rules of evidence are inapplicable in preliminary hearings).

the preliminary hearings of the majority of the other states.[23]

The decision below challenges the constitutional power to permit the use of hearsay at preliminary hearings. In so doing, it imperils the operation of the preliminary hearing.

To serve its function of providing a speedy release from unfounded arrest and detention, the preliminary hearing itself must be speedily held. The application of the confrontation clause to exclude hearsay from preliminary hearings would destroy that ability. To require that witnesses, whose evidence might normally be presented through affidavit or report, must be

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[23]Note, Confrontation Rights and Preliminary Hearings, 1986 Utah L. Rev. 75, 78; Wilson v. State, 655 P.2d 1246, 1250 (Wyo. 1982). In California, a ballot initiative recently amended the state's constitution and laws expressly to permit the use of hearsay at preliminary hearings. See Nollins v. Superior Court, 224 Cal. App. 3d 1171, 274 Cal. Rptr. 487, 493, review granted, 1990 Cal. LEXIS 5550 (Cal. 1990).

available before a hearing can be held, no matter how distant or hard to get the witnesses might be, will inevitably produce substantial delay.[24] To require live testimony on every point, and by application of the confrontation clause to remove the strictures normally placed on cross-examination at preliminary hearings,[25]

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[24]The facts of this case -- the essential witness who moves out of state after the crime -- show only one aspect of the difficulties involved in assembling live witnesses to replace hearsay in preliminary hearings. The tourist whose car was stolen on a brief visit to a major city and whose simple and generally irrefutable testimony regarding ownership and non-permission is now submitted by affidavit, the forensic pathologist who prepares autopsy reports for ten rural counties and whose reports are currently admitted in preliminary hearings hundreds of miles part, the urban police chemist whose reports are now used in over a thousand preliminary hearings a year, all must now be present before a preliminary hearing can be held. To obtain such a witness risks substantial delay; to coordinate such a witness with others in a multi-witness preliminary hearing guarantees substantial delay.

[25]In Pennsylvania, as elsewhere, preliminary hearing magistrates do not permit as extensive cross-examination in a

(continued...)

will lengthen the hearings, causing backlogs and additional delays.[26] To require the resolution of intricate confrontation clause/hearsay issues at the preliminary hearings might force the hearings to be conducted, not by non-lawyers as is now often the case, but by already-overstretched trial judges and prosecutors, causing even more delay.[27] Imposing such

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[25](...continued)
preliminary hearing as is permitted at trial. See Commonwealth v. Scarborough, 491 Pa. 300, 319, 421 A.2d 147 (1980); see also Commonwealth v. McCloskey, 443 Pa. at 136; accord Coleman v. Burnett, 477 F.2d 1187, 1201 (D.C. Cir. 1973).

[26]Delay due to backlog is a very real concern. There are over 50,000 preliminary hearings per year in an urban county such as Philadelphia.

[27]In Pennsylvania, as in other states, preliminary hearings may be held before quasi-judicial officers -- magistrates, justices of the peace, aldermen or district justices -- who need not be lawyers, see Pa. R. Crim. P. 141(d), 3(k); 42 Pa. Cons. Stat. Ann. §3112, and the Commonwealth's case is frequently presented by the "affiant," i.e., a police officer, rather than by an attorney for the Commonwealth, Pa. R. Crim. P. 141(b).

delays on the preliminary hearing will prevent it from providing the swift review which is its sole justification. See Gerstein v. Pugh, 420 U.S. at 120, 122 n.23 (complexity and delay argue against imposing additional procedural requirements on preliminary determinations).[28]

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[28]Imposing the confrontation clause on preliminary hearings also increases the high costs already imposed on victims and non-governmental witnesses, whose participation is indispensable to the functioning of the criminal justice system. These lay witnesses already have to appear repeatedly for trials which are repeatedly postponed. Requiring such lay witnesses to appear also at a preliminary hearing, which itself can be repeatedly postponed -- by unscrupulous defense counsel seeking to discourage the witnesses, by scrupulous defense counsel who need to prepare for what now is a mini-trial, or by the sheer difficulty of assembling all the witnesses -- is an invitation to non-participation. Also, requiring lay witnesses of fragile physical or emotional makeup, such as children, to undergo the trauma of testifying not once but twice, erects a substantial deterrent to participation. In addition, formalizing, lengthening and backlogging preliminary hearings will tax the resources of already badly-strapped prosecutorial agencies and lower courts.

The cost exacted by imposing the trial right of confrontation on preliminary hearings is all the more unjustifiable because it is unnecessary. A preliminary hearing "is not a trial in any sense of the word."[29] It is at trial that the accused's guilt or innocence will be determined, and at trial the confrontation clause will shield him from improper out-of-court evidence and enable him to cross-examine his accusers.[30] By contrast, the preliminary hearing's function is merely to protect against arrest and detention without cause. In that limited determination, this Court stated in Pugh, the value of

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[29] Commonwealth v. Rashed, 496 Pa. at 32 (citation omitted); see United States ex rel. Rutz v. Levy, 268 U.S. 390, 393 (1925) (a preliminary hearing "is not a trial in any sense").

[30] See Goldsby v. United States, 160 U.S. 70, 73 (1895) (summarily rejecting the claim that an accused was denied his right to confront the witnesses due to the absence of a preliminary hearing, because the witnesses were later present at trial).

confrontation and cross-examination "would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed." 420 U.S. at 121-22.[31]

The justices below imposed these unnecessary risks to the functioning of the preliminary hearing by misinterpreting the language of Coleman and Pugh. The justices primarily relied on this Court's holding in Coleman that a preliminary hearing is a "critical stage" of a criminal prosecution

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[31]The only conceivable instance in which the preclusion of hearsay from the preliminary hearing would prevent unwarranted detention would be in the rare case where the declarant would never be available and the only evidence the prosecution would ever have for trial is inadmissible hearsay. To guard against that remote possibility, the Pennsylvania courts look to the prosecution to provide some assurance that the absent declarant will be present for trial. Commonwealth v. Troop, 391 Pa. Super. at 622; Commonwealth v. Branch, 292 Pa. Super. at 429; Commonwealth v. Rick, 244 Pa. Super. at 37 n.1. The prosecution gave that assurance in this case.

at which counsel is required. Coleman v. Alabama, 399 U.S. at 9-10, 12.[32] This Court has never held, however, that confrontation or other trial rights must attend every "critical stage" of a prosecution.[33] Just because counsel's presence might be helpful at various stages in

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[32]Indeed, Coleman's holding was pivotal to the constitutional rulings of the three justices speaking through Justice Larsen, and of the two justices speaking through Justice Flaherty. The three justices not only relied on it in interpreting the federal constitution, but also hinged their finding of a correlative right under the state constitution on Coleman's holding. The state confrontation clause applied, they stated, because a preliminary hearing "is a critical stage in a criminal prosecution" (App. at 10A). Similarly, the two justices hinged their due process argument on Coleman's holding, saying that the due process principles applicable to final adjudications applied a fortiori to a preliminary hearing because it is "a critical stage of a criminal proceeding" (App. at 15A).

[33]For example, this Court has held that counsel is required at a post-indictment lineup because it is a "critical stage," United States v. Wade, 388 U.S. 218, 237 (1967), but it could not be claimed that at the lineup the defendant or his counsel could confront and cross-examine the witness.

a criminal prosecution does not require that each such stage be conducted as a mini-trial.

Second, the justices relied on language in Justice Brennan's plurality opinion in Coleman. Justice Brennan argued that the presence of counsel might be helpful at a preliminary hearing to fashion an impeachment tool for use at trial, and to discover the prosecution's case. 399 U.S. at 9 (plurality opinion, Brennan, J.). The raison d'etre of a preliminary hearing, however, is not to generate incidental discovery or impeachment tools for trial, but to provide speedy relief from unlawful detention. Indeed, pursuit of discovery and impeachment for trial is antithetical to that goal, as it lengthens and delays the preliminary hearing.[34] This Court

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[34] See Coleman v. Burnett, 477 F.2d at 1199-200 (cross-examination seeking discovery may be curtailed because discovery is not a legitimate end in itself at a

(continued...)

has never held that the Constitution requires the states to restructure their preliminary hearings to produce the harmful side effects at the expense of the cure.

Third, the justices below believed that this Court in Pugh implicitly held that the full panoply of constitutional safeguards, including confrontation, must attend a preliminary hearing (App. at 8A-9A).[35] They cite language in Pugh which

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[34](...continued)
preliminary hearing); Pa. R. Crim. P. 141, Official Comment (to preserve the limited function of a preliminary hearing, the accused may not examine witnesses merely for the purpose of discovering the Commonwealth's case); Commonwealth v. Rashed, 496 Pa. at 31-32 (same). Moreover, because the preliminary hearing is necessarily limited in scope, and because it is held at an early stage when the information gathered by the prosecution may be incomplete, the preliminary hearing is at best a dubious discovery tool. See Adams v. Illinois, 405 U.S. at 278, 282 (1972) (plurality opinion, Brennan, J.).

[35]While all the Pennsylvania justices acknowledged that this Court had not specifically held that these trial rights also governed preliminary hearings, the three justices stated that this Court had
(continued...)

notes that, in the preliminary hearing procedure in many states,

> adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.

420 U.S. at 119-20. To derive from this description of customary procedures in the states an implicit holding that the federal confrontation clause must govern state preliminary hearings is absurd. Pugh expressly held that it is constitutional to detain an accused pending trial using a non-adversarial hearing without according the accused any trial rights -- counsel, compulsory process, confrontation or cross-examination. 420 U.S. at 119-22.[36] Pugh

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[35](...continued)
"inferred as much" in Pugh (App. at 9A), and the two justices stated that this Court had so "implied in dictum" in Pugh (App. at 14A).

[36]Accord Costello v. United States, 350 U.S. 359, 361-63 (1956) (a defendant can be held for trial on an indictment based solely on hearsay evidence).

nowhere holds or implies that states have only two options -- grant only this bare bones procedure or grant the accused every trial right -- here, both cross-examination and exclusion of hearsay. To the contrary, this Court in Pugh emphasized that "[t]here is no single preferred pretrial procedure," and recognized "the desirability of flexibility and experimentation by the states." 420 U.S. at 123; see id. at 127 (Stewart, J., concurring). The justices below thus misinterpreted Pugh as well as Coleman.[37]

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[37]The cited portions of Coleman and Pugh form the sole constitutional basis for the decision of the three justices speaking through Justice Larsen. They cite no other constitutional case save Commonwealth v. Carver, 292 Pa. Super. 177, 179, 436 A.2d 1209 (1981), which itself relies on Coleman. Similarly, Coleman and Pugh formed the framework of the decision of the two justices speaking through Justice Flaherty. They cite no other constitutional authority save for the concurring opinions in Commonwealth, Unemployment Compensation Board of Review v. Ceja, 493 Pa. 588, 427 A.2d 631 (1981), which rely on the general "constitutional right of confrontation," 493 Pa. at 618 (Roberts, J., concurring), and on "[f]undamental due process," 493 Pa. at 619 (continued...)

The ruling below does not merely misinterpret Coleman and Pugh. It also conflicts with this Court's repeated pronouncements that the right of confrontation is a trial right.[38] Extension of the right of confrontation beyond its trial context to a preliminary hearing setting is

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[37](...continued)
(Flaherty, J., concurring). See generally Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (this Court may review a state court decision which rests primarily on federal law or is interwoven with federal law).

[38]Barber v. Page, 390 U.S. 719, 725 (1968) ("The right of confrontation is basically a trial right"); California v. Green, 399 U.S. 149, 157-58 (1970) ("it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); Pennsylvania v. Ritchie, 480 U.S. 39, 52-54 & n.10 (1987) ("The opinions of this Court show that the right to confrontation is a trial right") (plurality opinion; emphasis in original); see Kentucky v. Stincer, 482 U.S. 730, 737 n.9 (1987); Gerstein v. Pugh, 420 U.S. at 121-22 (confrontation and cross-examination are "formalities and safeguards designed for trial"); Mancusi v. Stubbs, 408 U.S. 204, 211 (1972); see also McCray v. Illinois, 386 U.S. 300, 313-14 (1967) (summarily rejecting claim of confrontation clause violation at pre-trial hearing as "absolutely devoid of merit").

itself a dramatic reinterpretation of the Constitution. It also necessarily implicates other pre-trial settings (e.g., grand jury proceedings) and other trial rights (e.g., compulsory process), threatening an even larger disruption of pre-trial procedures. This Court should not allow such a drastic constitutional change to be imposed without review.

The decision below also conflicts with the repeated pronouncements by the federal courts and numerous state courts that the federal confrontation clause does not apply to preliminary hearings.[39] Such conflict,

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[39] E.g., United States v. Andrus, 775 F.2d 825, 836 (7th Cir. 1985) ("the sixth amendment does not provide a confrontation right at a preliminary hearing"); United States v. Mitchell, 540 F.2d 1163, 1165 n.1 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (the confrontation clause does not forbid the use of hearsay at a preliminary hearing); United States v. Wilkins, 422 F. Supp. 1371, 1374-75 (E.D. Pa.), aff'd mem., 547 F.2d 1164, 1166 (3d Cir. 1976) and 559 F.2d 1210 (3d Cir. 1977), vacated, 441 U.S. 468 (1979) (to allow a timely petition for certiorari), aff'd mem., 601 F.2d 577, 578 (continued...)

conflict, made more pressing by the other courts that have adopted similarly misguided interpretations of the Federal

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[39](...continued)
(3d Cir.), cert. denied, 444 U.S. 877 (1979) (the sixth amendment is not violated by the failure of the victim to appear at the preliminary hearing); Nollins v. Superior Court, 224 Cal. App. 3d 1171, 274 Cal. Rptr. 487, 495-500, review granted, 1990 Cal. LEXIS 5550 (Cal. 1990) (there is no sixth amendment right of confrontation at a preliminary hearing); Wilson v. State, 655 P.2d 1246, 1252 (Wyo. 1982) (there is no constitutional bar to use of hearsay evidence at a preliminary hearing); United States v. Edwards, 430 A.2d 1321, 1337-38 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982) (there is no constitutional right to confrontation at a pre-trial detention hearing); People v. Campbell, 92 Misc. 2d 732, 401 N.Y.S.2d 152, 155 (1978) (there is no sixth amendment requirement of confrontation at a preliminary hearing); see Note, Confrontation Rights and Preliminary Hearings, 1986 Utah L. Rev. 75, 83 & n.54 (citing cases).

Constitution,[40] should not be left unresolved.

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[40] E.g., State v. Massengill, 99 N.M. 283, 657 P.2d 139, 140 (App. 1983) (there is a sixth amendment right to confrontation at the preliminary hearing); Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850, 852 & n.3 (1981) (same, relying on language in Pugh); see State v. Anderson, 612 P.2d 778, 785 & n.28 (Utah 1980) (relying on Coleman in finding that the right of confrontation applies to preliminary hearings under state constitution).

CONCLUSION

For all these reasons, petitioner respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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A P P E N D I X

Supreme Court of Pennsylvania
Eastern District

Commonwealth of Pennsylvania ex rel. M. Russell Buchanan, Appellant	:	No. 63 E.D. Appeal Docket 1989
v.	:	
District Justice Edward Verbonitz and The District Attorney of Luzerne County	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the trial court is reversed, the charges are dismissed and the appellant is discharged.

/s/
Bernice G. LaBoo
Chief, Clerk

Dated: October 10, 1990

[J-141-1990]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ex rel. M. RUSSELL BUCHANAN, Appellant	:	No. 63 Eastern District Appeal Docket 1989
	:	Petition for Allowance of Appeal from the Order of the Superior Court, entered on October 3, 1988, at No. 343 Misc. Dkt. No. 15, Denying the Petition for Review of the Order of the Court of Common Pleas of Luzerne County, entered on September 14, 1987, at No. 4299 C 1987.
v.	:	
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Appellees	:	SUBMITTED: September 24, 1990

OPINION OF THE COURT

JUSTICE ROLF LARSEN

FILED: October 10, 1990

The issue presented in this case is whether hearsay testimony presented at a preliminary hearing regarding a victim's account of an alleged criminal incident,

which is the sole evidence presented by the Commonwealth, is sufficient to establish a prima facie case.

On June 24, 1987, Appellant, M. Russell Buchanan, was arrested and charged with statutory rape, corruption of a minor and endangering the welfare of a child. A preliminary hearing was held before District Justice Edward Verbonitz, Luzerne County. At the hearing the Commonwealth, over defense counsel's objection, presented the hearsay testimony of the investigating police officer, who recounted the alleged criminal incident as it was alleged to have been related to him by the victim, a seven year old child. The victim did not testify, nor was any other evidence presented at the preliminary hearing. The district justice ruled that the Commonwealth had established a prima facie case and bound Buchanan over for trial.

Thereafter, Buchanan filed a writ of habeas corpus in the court of common pleas. At Buchanan's habeas corpus hearing the Commonwealth, over defense counsel's objection, put into evidence the transcript of the preliminary hearing. No additional evidence was presented. The trial court entered an order denying habeas corpus relief and upon the motion of Buchanan, refused to amend its order to include certification language, to provide permission to appeal the interlocutory order (Pa. R.A.P. 1311). Buchanan filed a petition for review in the Supreme Court which was transferred to the Superior Court. The Superior Court denied the petition for review, and Buchanan petitioned the Supreme Court for allowance of appeal. We granted allocatur and now reverse.

In Pennsylvania, a person accused of a crime, with certain exceptions not

applicable to this case,[1] has a right to a preliminary hearing. Commonwealth ex rel. Fitzpatrick v. Mirarchi, 481 Pa. 385, 392 A.2d 1346 (1978). The principal reason for a preliminary hearing is "to protect an individual's right against unlawful arrest and detention." Commonwealth ex rel. Maisenhelder v. Rundle, 414 Pa. 11, 198 A.2d 565, 567 (1964). The preliminary hearing:

> seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed or for a crime with which there is no evidence of his connection.

Id. At the preliminary hearing it is incumbent on the Commonwealth to establish "at least prima facie that a crime has been committed and that the accused is the one

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[1]The exceptions to the rule that an accused has a right to a preliminary hearing are where: 1) the accused is a fugitive from justice; 2) there is a presentment of an investigating grand jury directly to an indicting grand jury; and 3) an indicting grand jury makes a presentment based on personal knowledge of the jurors. See, Commonwealth ex rel. Fitzpatrick v. Mirarchi, 481 Pa. 385, 392 A.2d 1346 fn. 7 (1978).

who committed it." Commonwealth v. [Mullen], 460 Pa. 336, 341, 333 A.2d 755, 757 (1975) (emphasis added), [sic] See also, Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978). In order to satisfy this burden of establishing a prima facie case, the Commonwealth must produce legally competent evidence, Commonwealth v. Shain, 493 Pa. 360, 426 A.2d 589 (1981), which demonstrates the existence of each of the material elements of the crime charged and legally competent evidence to demonstrate the existence of facts which connect the accused to the crime charged. See, Commonwealth v. Wodjak [sic], 502 Pa. 359, 466 A.2d 991 (1983).

In this case it is clear that the Commonwealth did not meet its burden. As Justice Flaherty stated in his concurring opinion in Commonwealth, Unemployment Compensation Board of Review v. Ceja, 493 Pa. 588, 619, 427 A.2d 631, 647 (1981)

"[f]undamental due process requires that no adjudication be based solely on hearsay evidence." If more that [sic] "rank hearsay" id. is required in an administrative context, the standard must be higher in a criminal proceeding where a person may be deprived of his liberty. The testimony of a witness as to what a third party told him about an alleged criminal act is clearly, inadmissible hearsay, Commonwealth v. Maybee, 429 Pa. 222, 239 A.2d [332] (1968), Commonwealth v. Whitner, 444 Pa. 556, 281 A.2d 870 (1971) and thus, does not constitute legally competent evidence. In this case the Commonwealth has failed to establish prima facie that a crime has been committed and that Buchanan committed that crime.

Additionally, a criminal defendant has a right to confront and cross-examine the witnesses against him: this right being

secured by the United States Constitution;[2] the Pennsylvania Constitution;[3] and the Pennsylvania Rules of Criminal Procedure.[4] In Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed.2d 387 (1970) the United States Supreme Court held that a preliminary hearing is a "critical stage" of the prosecution so as to constitutionally require representation by

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[2]["]In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. Const. amend. VI.

[3]["]In all criminal prosecutions the accused hath a right ... to meet the witnesses face to face, ..." Pa. Const. Art[.] 1 §9.

[4]The defendant shall be present at any preliminary hearing except as provided by these rules, and may, if he desires; [sic]

(1) be represented by counsel[;]

(2) cross-examine witnesses and inspect physical evidence [offered] against him;

* * *

Pa. R. Crim. Pro. 141(c).

counsel. See also, Commonwealth v. Carver, 292 Pa. Super. 177, 436 A.2d 1209 (1981). Justice Brennan in his "Opinion Announcing the Judgment of the Court," in Coleman, listed four purposes for requiring the "guiding hand" of ccunsel at a preliminary hearing:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Id. at 10, 90 S. Ct. at 2003, 26 L. Ed.2d at 397.

While the United States Supreme Court has not specifically held that the full panoply of constitutional safeguards (ie. [sic], confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed.2d 54 (1975). In Pugh, the court held that the right [sic] to counsel, confrontation, cross-examination and compulsory process are not essential for a pre-trial detention hearing held pursuant to the Fourth Amendment because such a hearing is not adversarial in nature. The court stated, however, that when a pretrial hearing takes the form of a preliminary hearing and thus, adversary procedures are used, "[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on

cross-examination." Id. at 120, 95 S. Ct. at 866, 43 L. Ed. 2d 69.

The Pennsylvania Constitution provides that "in all criminal prosecutions" the accused has a right to meet the witnesses against him -- "face to face." Pa. Const. Art. 1 §9. This right necessarily includes the right to confront witnesses and explore fully their testimony through cross-examination. A preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution. It is not a sidebar conference at which offers of proof are made. Thus, the Pennsylvania Constitution mandates a criminal defendant's right to confrontation and cross-examination at the preliminary hearing. In this case, Buchanan was denied the right to confront and cross-examine the witnesses against him.

Accordingly, the order of the trial court is reversed, the charges are dismissed and the appellant is discharged.

Mr. Justice Flaherty files a concurring opinion which Mr. Justice Cappy joins.

Mr. Chief Justice Nix files a dissenting opinion which Mr. Justice McDermott joins.

Mr. Justice McDermott files a dissenting opinion.

[J-141-1990]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ex rel. M. RUSSELL BUCHANAN, Appellant	:	No. 63 E.D. Appeal Docket 1989
	:	Petition for Allowance of Appeal from the Order of the Superior Court, entered on October 3, 1988, at No. 343 Misc. Dkt. No. 15, Denying the Petition for Review of the Order of the Court of Common Pleas of Luzerne County, entered on September 14, 1987, at No. 4299 C 1987.
v.	:	
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Appellees	:	SUBMITTED: September 24, 1990

CONCURRING OPINION

MR. JUSTICE FLAHERTY

FILED: October 10, 1990

I concur in the result, but reach the same conclusion through an analysis somewhat different from that employed by the plurality.

There is no federal or state constitutional right to a preliminary hearing. Commonwealth v. Ruza, 511 Pa. 59, 511 A.2d 808 (1986). The right is statutory, embodied in Pa.R.Crim.P. 141, 42 Pa.C.S.A., which sets forth the purpose and procedure of the preliminary hearing. The purpose is to determine whether there is a prima facie case of the defendant's guilt. Pa.R.Crim. P. 141(d). To establish a prima facie case, the Commonwealth must produce evidence which presents "sufficient probable cause to believe that the person charged has committed the offense stated." United States v. Johns, 4 U.S. (4 Dall.) 412, 413, 1 L.Ed. 888 (1806). The evidence must be such that "if presented at the trial in court, and accepted as true, the judge would be warranted in allowing the case to go to the jury." Commonwealth v. Wojdak, 502 Pa. 359, 368, 466 A.2d 991, 996 (1983) (emphasis in original).

Though there is no constitutional right to a preliminary hearing, inasmuch as state law provides the hearing, assigns to it the functions it serves, and attaches to it the consequences which presently exist, there is a constitutional right to be represented by an attorney at the hearing. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). The United States Supreme Court has implied in dictum, but has not held, that other rights, such as the right to confrontation and the right to cross-examination, are constitutionally protected at the preliminary hearing. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

These principles provide a framework for our decision, but do not answer the question presented to us: whether hearsay testimony, standing alone, may constitute sufficient evidence to establish a prima

facie case at a preliminary hearing. I conclude that it cannot.

I deem this to be a requirement of due process. In Commonwealth, Unemployment Compensation Board of Review v. Ceja, 493 Pa. 588, 616, 427 A.2d 631, 645 (1981), a plurality of this Court referred to "this Commonwealth's long-standing requirement that administrative findings must be supported by some evidence that would be admissible over objection in a court of law." This author expressed the view that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." Id. at 619, 427 A.2d at 647. The reference in Ceja was to a final adjudication of property rights, but the principle a fortiori applies with equal force in a preliminary hearing -- a critical stage of a criminal proceeding in which life, death, liberty, and property are all at issue.

Applying this principle to this case requires the conclusion that the hearsay statement of the police officer was insufficient, vel non, to establish a prima facie case against appellant. It was a hearsay statement which could not be admitted over objection in a criminal trial and thus, standing alone, it was insufficient to establish a prima facie case, which, according to Wojdak, supra, must be based on evidence which could be presented at the trial in court. I therefore concur in the judgment that the Commonwealth's evidence at appellant's preliminary hearing failed to establish a prima facie case, and that appellant is entitled to discharge.

This analysis does not require us to address issues not squarely presented by the facts of this case, viz., the applicability and implementation of the constitutional rights of confrontation and cross-examination of witnesses who testify at the

preliminary hearing in a criminal prosecution. In this case the declarant did not testify, and we need not offer an opinion as to what would have happened had she done so. It is sufficient to hold that a prima facie case cannot be established at a preliminary hearing solely on the basis of hearsay testimony.

Accordingly, I concur in the result.

Mr. Justice Cappy joins this opinion.

[J-141-1990]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ex rel. M. RUSSELL BUCHANAN, Appellant	:	No. 63 E.D. Appeal Docket 1989
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court, entered on October 3, 1988, at No. 343 Misc. Dkt. No. 15, Denying the Petition for Review of the Order of the Court of Common Pleas, Criminal Division, of Luzerne County, entered on September 14, 1987, at No. 4299 C 1987.
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY	:	SUBMITTED: September 24, 1990

DISSENTING OPINION

NIX, C. J.

FILED: October 10, 1990

I am constrained to disagree with the holding that the Sixth Amendment of the Federal Constitution which provides the

accused with the right of confrontation in criminal prosecutions was offended by the procedures followed in the instant matter. I also must take issue with the conclusion that Article I, section 9 of our state constitution required the appearance of this seven-year-old child who was allegedly the victim of sexual assault and abuse by the instant petitioner for cross-examination during this preliminary stage of the proceedings.

Under our long-standing law, the test of sufficiency of the evidence to hold a defendant for trial upon charges has been the showing of prima facie evidence that a crime has been committed and that the defendant was the perpetrator of that offense. Commonwealth v. Ruza, 511 Pa. 59, 511 A.2d 808 (1986); Commonwealth v. Wojdak, 502 Pa. 359, 466 A.2d 991 (1983); Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978); Commonwealth ex rel. Maisenhelder

v. Rundel [sic], 414 Pa. 11, 198 A.2d 565 (1964). To satisfy this requirement the evidence presented by the Commonwealth must show that the existence of each of the material elements of the charge is present. The evidence should be such that, if presented at the trial in court and accepted as true, the judge would be warranted in allowing the case to go to the jury. Commonwealth v. Wojdak, supra; Commonwealth v. Prado, supra. However, the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense. Commonwealth v. Wojdak, supra at 369, 466 A.2d ___. As the Superior Court has noted in several opinions in which they sustained a trial court's preliminary finding of prima facie evidence based on hearsay evidence:

> The question at a preliminary hearing is not whether there is sufficient

> evidence to prove the defendant guilty beyond a reasonable doubt; rather, the question is whether the prosecution must be dismissed because there is nothing to indicate that the defendant is connected with the crime.

See Commonwealth v. Rick, 244 Pa. Super. 33, 36, 366 A.2d 302 [(1976)]; see also, Commonwealth v. Davis, 308 Pa. Super. 204, 454 A.2d 92 (1982); Commonwealth v. Branch, 292 Pa. Super. 425, 437 A.2d [748] (1981).

The fact that this child of tender years was abused was established at the preliminary hearing, and that issue is not being challenged. The present carp of petitioner is that he was denied the opportunity to confront the victim and cross-examine her as to petitioner's involvement in the molestation. That the victim identified her abuser was established by the testimony of the police officer involved. The question is whether the defendant's right to confrontation required that the identification be made by the victim at

the time of the preliminary hearing. The instant constitutional issue being raised is whether petitioner was entitled to a face-to-face confrontation at the preliminary stage of the "criminal prosecution." The protection afforded defendant at this preliminary stage does not encompass the right to confront and cross-examine potential Commonwealth witnesses. See, e.g., Commonwealth v. Prado, supra; Commonwealth ex rel. Maisenhelder v. Rundel [sic], supra.

The majority's application of the stringent evidentiary standards guaranteed by the defendant's right to confront the witnesses against him is unwarranted in the setting of a preliminary hearing and here conflicts with the overriding interest this Commonwealth has shown in protecting child-witnesses in abuse cases. Therefore, I must vigorously disagree with the majority's conclusion that either the Sixth

Amendment of the Federal Constitution or Article I, section 9 of the constitution of this Commonwealth dictates such a result.

Mr. Justice McDermott joins this dissenting opinion.

J-141-90
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ex rel. M. RUSSELL BUCHANAN, Appellant	:	No. 63 E.D. Appeal Docket 1989
v.	:	Appeal from the Order of the Superior Court, entered on October 3, 1988, at No. 343 Misc. Dkt. No. 15, Denying the Petition for Review of the Order of the Court of Common Pleas of Luzerne County, entered on September 14, 1987, at No. 4299 C 1987.
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Appellees	:	SUBMITTED: September 24, 1990

DISSENTING OPINION

MR. JUSTICE McDERMOTT

FILED: October 10, 1990

I join with the Chief Justice in dissent and write only to emphasize that credibility is not in issue at a preliminary hearing. A preliminary hearing does not determine guilt or innocence, its function

is only to determine whether, if believed, the facts offered would support the elements of a legally identifiable offense. The Commonwealth is not required to present all the proofs at their disposal, only those sufficient to establish a prima facie case. To surrender, as the majority appears willing, credibility determinations to a preliminary hearing, is to make the first level of judicial process the final one.

The court has defined the purpose of a preliminary hearing as follows:

> It seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection. It is not a trial in any sense of the word. It does not purport or attempt to determine the guilt or innocence of the accused, nor is he required to speak, plead or offer testimony in defense.

Commonwealth ex rel. Maisenhelder v. Rundle, 414 Pa. 11, 15, 198 A.2d 565, 567

(1964); Commonwealth v. Rashed, 496 Pa. 26, 32, 436 A.2d 134, 137 (1981).

It is not a place for cracker barrel justice, unless we wish to return to those thrilling days of yesteryear when local magistrates did what they pleased.

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
2044 ROBERT N.C. NIX, SR. FEDERAL BUILDING
NINTH AND CHESTNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19107

October 3, 1988

Frank W. Nocito, Esquire
63 Pierce Street
Kingston, Penna. 18704

Re: Commonwealth ex rel. M. Russell Buchanan, Petitioner v. District Justice Edward Verbonitz, et al.
No. 343 Miscellaneous Docket No. 15

Dear Mr. Nocito:

This is to advsie [sic] that the following Order has been entered in the above-captioned matter:

"AND NOW, this 3rd day of October, 1988, the petition for review at No. 343 Miscellaneous Docktet [sic] No. 15 is denied.

s/ Per Curiam"

Very truly yours,

David A. Szewczak
PROTHONOTARY

DAS:rk
cc: Joseph C. Giebus, Esq.
Asst. Dist. Atty.
cc: Hon. Bernard C. Brominski
cc: Clerk of Court, Criminal, Luzerne

COMMONWEALTH OF PENNSYLVANIA ex rel. M. RUSSELL BUCHANAN, Petitioner	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY
	:	HABEAS CORPUS
Vs.	:	
	:	NO. 4299-C of 1987
DISTRICT JUSTICE EDWARD VERBONITZ AND THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Defendants	:	Before: Brominski, J. Misc. Court Judge

O R D E R

NOW, this 14[th] day of September, 1987, at 2:50 o'clock P.M., it is hereby ORDERED, ADJUDGED and DECREED that the Petition for Writ of Habeas Corpus filed on August 25, 1987, is DENIED and DISMISSED.

BY THE COURT,

/s/ Brominski, J.

Frank W. Nocito, Esq.
Attorney for Petitioner

Bernard A. Podcasy, D.A.
Virginia J. Murtha, A.D.A.
Attorneys for Defendants

COMMONWEALTH OF PENNSYLVANIA, ex rel., M. RUSSELL BUCHANAN, Petitioner	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY
Vs.	:	CIVIL DIVISION
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Respondent	:	NO. 4299-C of 1987
	:	Before: Brominski, J. Misc. Court Judge

DECISION

This decision is written in support of the Order of this Court dated September 14, 1987.

That Order was precipitated by a writ of habeas corpus filed by M. Russell Buchanan on August 25, 1987.

Mr. Buchanan was charged with statutory rape, corruption of minors and endangering the welfare of children.

At the hearing on the writ of habeas corpus, the only witness called by the Commonwealth was Detective/Lieutenant Daniel Yursha, and the Commonwealth indicated it

would be the same testimony as at the preliminary hearing.

At the preliminary hearing, the Commonwealth established that the victim currently lives in West Virginia and was not present. However, the Commonwealth assured the Court that the victim will be available at the time of trial.

Detective/Lieutenant Yursha testified that he is employed in the District Attorney's Office, and he investigated the complaint against Mr. Buchanan filed from information he received from the Family Service out of West Virginia; that he interviewed the victim in this case. She was nine years old, and at the time of the offense she was seven years old. Over objection from defense counsel, he testified the victim told the investigator that in the early morning hours of April 26, 1986, she went into the bedroom of the Defendant; that Mr. Buchanan was already

nude in bed and called the victim over to the bed and grabbed her right into the bed; that the victim did have a set of shorty pajamas on, a two-piece pajama set. Mr. Buchanan then proceeded to hold the victim's mouth with one hand and removed the bottoms of her pajamas with the other hand, where he turned her sideways and put himself against the back of her, inserting his penis into her anus. The victim told him that the Defendant went in and out of her at least five times and that it hurt very much; that she didn't know what was happening; that when she related the story she indicated that the penis was a weiner and that her anus was a booty-hole; that Mr. Buchanan told her that he would always be around and that he would beat her or whip her if anything was mentioned; that Mr. Buchanan was the paramour of the victim's mother, and the three of them lived together at the same address in

Wilkes-Barre Township; that at the time of the alleged offense Mr. Buchanan and the victim were the only two people living at the residence; he was a babysitter for a two-week period.

On cross-examination he testified that he did not have a written statement from the mother that she'll be present at the trial, only a verbal agreement; that he did not have a written statement from Ms. Raghib of Kanawha Valley, West Virginis [sic] Family Service Association that the child or mother will be present at trial or Detective Vance of the Charleston Police Department; that he did not secure a subpoena from District Justice Court 11-3-07 to compel the appearance of Demita or her mother today; that he did not attempt to secure their presence by use of the Uniform Witness Act; his investigation did not reveal any witnesses to the alleged offense; that he had no medical testimony;

that the only person who could testify to the act was the victim; that he talked with Mr. Buchanan twice, once on March 26, 1987 at the Children & Youth Center; he was read his constitutional warning; he appeared voluntarily for the interview and denied the charges; that he was told that if cooperative, the charges may not have been so severe, and he still denied the charges. The second interview was June 8, 1987, and he again denied the charges; that the date of the alleged incident was April 26, 1986, and was reported to the West Virginia authorities on June 30, 1987.

The Defendant's contention is that although hearsay testimony has been allowed at the preliminary hearing and hearings on writs of habeas corpus, the hearsay testimony was improperly admitted in case sub judice in that the hearsay testimony went right to the corpus of the crime, rape.

This argument was considered in Commonwealth v. James, 38 [Pa.] D. & C. 3d 311 [(1984)]. Judge Brown in reviewing the progeny of the hearsay rule in these circumstances, in discussing Vedan, Jochen, Branch, Rick and Banks held that even though the witness testified as to the hearsay testimony, even if it went to the corpus of the crime, it was admissible if the witness was available at trial. Here, we have the assurance of the Commonwealth that the alleged victim will be available at trial.

Therefore, the reason above warrants the following:

END OF DECISION

Order on Separate Page - [8C]

COMMONWEALTH OF PENNSYLVANIA, ex rel., M. RUSSELL BUCHANAN, Petitioner	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY
	:	CIVIL DIVISION
Vs.	:	
	:	NO. 4299-C of 1987
DISTRICT JUSTICE EDWARD VERBONITZ and THE DISTRICT ATTORNEY OF LUZERNE COUNTY, Respondent	:	Before: Brominski, J. Misc. Court Judge

O R D E R

NOW, this 19th day of February, 1988, at 11:15 o'clock A.M., it is hereby ORDERED, ADJUDGED and DECREED that the writ of habeas corpus filed on August 25, 1987, by M. Russell Buchanan is DENIED and DISMISSED.

BY THE COURT,

/s/ Brominski, J.

Frank W. Nocito, Esq.
Attorney for Petitioner

District Attorney's Office

(2)

No. 90-1115

Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CORREALE F. STEVENS, District Attorney
of Luzerne County,

Petitioner,

vs.

M. RUSSELL BUCHANAN,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Supreme Court has jurisdiction to review a state determination of the evidentiary requirements of a state preliminary hearing?

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinion Below.....	1
Statement of Jurisdiction.....	2
Constitutional Provisions Involved .	2
Counterstatement of the Case.....	2
Reasons for Denying the Writ.....	3
I. The United States Supreme Court should not review a state determination of the evidentiary requirements of a state preliminary hearing as no federal question is presented therein.....	3
Conclusion.....	6

TABLES OF AUTHORITIES

Cases Cited:

Alberton v. Millard, 345 U.S. 242,73 S.Ct. 600,97 L.Ed.983 (1953).....5

Coleman v. Alabama, 399 U.S.1,90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970).....4,5

Commonwealth v. Mayberry, 459 Pa. 91, 327 A.2d 86 (1974).....4

Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)....4

Federal Constitution and Statutes Cited:

Fourth Amendment.....2

28 U.S.C. § 1257 (a)..... 2

Pennsylvania Statutes and Rules Cited:

Pa. R. Crim. P. 141.....4
Pa. R. Crim. P. 143.....4
Pa. R. Crim. P. 141-149.....4

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M. RUSSELL BUCHANAN,
Respondent

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, M. Russell Buchanan, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, seeking review of the Pennsylvania Supreme Court's opinion in this case. That opinion is reported at 581 A.2d 172.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered by the Supreme Court of Pennsylvania on October 10, 1990. The jurisdiction of this Court is not invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers,and effects, against unreasonable seizures, shall not be violated,and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

COUNTERSTATEMENT OF THE CASE

On June 24, 1987, the Respondent, M. Russell Buchanan, was arrested and charged with committing the offenses of statutory rape, corruption of minors and endangering the welfare of children. At the preliminary hearing, the Commonwealth, over defense counsel's objection, presented the hearsay testimony of the investigating police officer, who recounted the alleged

criminal incident as it was alleged to have been related to him by the purported victim, a seven year old child. The alleged victim did not testify, nor was any other evidence presented at the hearing. The sole evidence presented was the investigating officer's hearsay rendition of the alleged incident. The District Justice ruled that the Commonwealth had established a *prima facie* case and bound Mr. Buchanan over for trial.

Subsequently, an interlocutory appeal of the decision to bind the case over for trial was perfected and the Pennsylvania Supreme Court entered an Order dismissing the charges and discharging the Respondent. The Pennsylvania Supreme Court held that where the sole evidence presented against a defendant at a preliminary hearing is hearsay evidence, the Commonwealth has failed to establish a *prima facie* case against the Defendant.

REASONS FOR DENYING THE WRIT

I.

The United States Supreme Court should not review a state determination of the evidentiary requirements of a state preliminary hearing, as no federal question is presented therein.

The Fourth Amendment to the United States Constitution requires a judicial determination of probable cause as a prerequisite to extended restraint of

liberty following arrest. **Gerstein v. Pugh**, 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed. 2d 54 (1975). In **Gerstein**, this Court stated that there is no single preferred pretrial procedure for determining probable cause, and this Court recognized the desirability of flexibility and experimentation by the States in this area. This probable cause determination may thus, under the Fourth Amendment, be reached in a variety of forums; Pennsylvania has chosen the preliminary hearing.[1] Pennsylvania Rules of Criminal Procedure Nos. 141-149, 42 Pa. C.S.A.

With the Pennsylvania Supreme Court's adoption of the Pennsylvania Rules of Criminal Procedure, the right of the accused to a preliminary hearing became a part of the statutory law of the Commonwealth. In addition to providing the preliminary hearing, state law also sets forth the procedure for the preliminary hearing. Pa. R. Crim. P. 141, 143, 42 Pa. C.S.A. State law further mandates that the prosecution's burden of proof at the preliminary hearing is to establish at least a *prima facie* case of the defendant's guilt. *Id.* As such, the right to a preliminary hearing and the evidentiary requirements of this hearing are purely matters of state Law.

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[1]. There is no constitutional right, federal or state, to a preliminary hearing. **Coleman v. Alabama**, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); **Commonwealth v. Mayberry**, 459 Pa. 91, 327 A.2d 86 (1974).

In order to resolve the issue posed in the instant case, that is, whether hearsay evidence alone is sufficient to establish a *prima facie* case at a preliminary hearing, the Pennsylvania Supreme Court had to interpret the aforesaid Pennsylvania statutory law governing a preliminary hearing. In **Albertson v. Millard,** 345 U.S. 242, 244, 73 S. Ct. 600, 601 - 602, 97 L. Ed. 983, 985 (1953), this Court held that the interpretation of state legislation is the function of state judicial and administrative authorities, and the construction given to a state statute by the state courts is binding upon the federal courts. Accordingly, the Pennsylvania Supreme Court's interpretation of state statutory law governing a preliminary hearing is a state function, and the construction of the state preliminary hearing statutes by the Pennsylvania Supreme Court is binding upon the federal courts. Further, in **Coleman v. Alabama**, 399 U.S.1, 90 S.Ct. 1999, 26 L. Ed. 2d 387 (1970) in discussing the preliminary hearing in Alabama, this Court acknowledged that it was bound by the Alabama Court of Appeals' construction of the governing Alabama law as to preliminary hearings in that state. As such, the Pennsylvania Supreme Court's ruling that where the sole evidence presented at a preliminary hearing is hearsay, a *prima facie* case is not established is binding upon the federal courts. Similarly, the Pennsylvania Supreme Court's determination of evidentiary requirements at a state preliminary hearing is thus a Pennsylvania preogative and ought not be disturbed by the United States Supreme Court, for no federal question is presented therein.

CONCLUSION

Based upon the foregoing law and argument, the Respondent, M. Russell Buchanan, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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